

NOTES OF INTEREST AND GUIDANCE (CONT.)

COUNSEL'S CORNER

You may recall from your civics or government classes in school that the Federal Government is one of delegated rather than of so-called natural powers. Both the executive and legislative branches of Government are delegated specific duties under the Constitution, and the executive agencies, in turn, have only that authority which either the Congress or the President has chosen to bestow upon them. Accordingly, naval personnel, whether active duty or civilian, can proceed with a desired course of action only if there has first been an affirmative grant of authority, or a series of grants of authority, that reaches down to them. Of course, the action to be taken must also be within any limitations, restrictions or conditions attached to each redelegation.

Contracting authority is a perfect example of this system of delegated powers. It is universally recognized that the Federal Government has the inherent authority to contract for supplies and services in support of the specific duties it is charged with performing by the Constitution. By various statutes, contracting authority has been passed to the heads of agencies within the executive branch, including the Secretary of the Navy. The Federal Acquisition Regulation (FAR) sets out a system whereby these agency heads can redelegate this authority to other officials within their respective organizations. The FAR permits agency heads to create contracting activities and delegate to the heads of such contracting agencies (called HCAs) broad authority to manage the agency's contracting functions. Agency heads, through the HCAs, also are allowed to redelegate their authority to enter into and sign contracts on behalf of the Government to contracting officers. Only contracting officers have the power to bind the Government in contract and obligate appropriated funds. Each contracting officer receives his/her appointment in writing and this "warrant" provides clear instructions regarding the limits, if any, of the authority granted.

An unauthorized commitment occurs when an individual who lacks the requisite delegation of authority attempts to enter into an agreement for goods or services with a private party in the name of the Government. For example, a doctor makes an unauthorized commitment when he instructs a vendor to deliver a medical supply item and promises that the Government will pay for it. An unauthorized commitment also occurs when a warranted contracting or ordering officer exceeds or ignores any limitation placed against his/her authority, such as the monetary amount of the transactions he/she can enter, the type of contract he/she can use or the type of commodity he/she can purchase. It is important to recognize that such unauthorized commitments are not binding on the Government and the person making it runs the risk of being held personally liable for the cost of the items purchased.

Contracting and ordering officers may not issue a contract after the fact to cover an unauthorized commitment. While the FAR and supplementing DoD and Navy regulations do provide for a procedure by which unauthorized commitments can be ratified, this can entail several levels of review and be a painful experience for the person making the commitment. As part of a ratification action, the regulations require this employee to forward to his/her commanding officer a complete statement as to the circumstances surrounding the unauthorized transaction and an explanation of why normal procurement procedures were not followed. Before ratification will be approved, the commanding officer must verify the accuracy and completeness of the submission and take appropriate measures to prevent a recurrence of such commitments.

This is an area where "an ounce of prevention is worth a pound of cure." When dealing with parties outside the Government, all naval personnel should know the limits of their authority and act accordingly.